REFERENCE:

COEUR D'ALENE TRIBE

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April 2, 2018

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Environmental and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
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Washington, D.C. 20044

RE: Comments on the Consent Decree (Civ. No. 2:04-cv-00126, United States of America v. Placer Mining and Robert Hopper, Jr. and the Settlement Agreement and Order on Consent for Response Action by Bunker Hill Mining Corp; In re: Bunker Hill Mining Corp.)

Dear Sir:

As you know, the Coeur d'Alene Tribe has been uniquely impacted by the mining activities and resultant pollution in the Silver Valley upstream from the Coeur d'Alene Reservation. The Tribe's homeland encompasses all of the Bunker Hill Superfund Facility and the Coeur d'Alene River drains into Coeur d'Alene Lake, which the Supreme Court has affirmed is owned by the Coeur d'Alene Tribe within the current boundaries of the Coeur d'Alene Reservation. *Idaho v. United States*, 533 U.S. 262 (2001). As a result of the past, present, and future releases of hazardous substances that exist in the Basin, tribal natural resources and the cultural and spiritual identity of the people have been greatly impaired. The Tribe has been working diligently with the EPA for over three decades to restore these important resources.

Because of its long relationship with the EPA, the Tribe was disheartened to learn that the EPA has entered into a consent decree ("Bunker Hill Consent Decree") regarding the Bunker Hill Central Treatment Plant ("CTP") without first consulting with the Tribe. Instead, the Tribe learned of this agreement along with everyone else when the EPA issued a news release on March 12, 2018. Since then, the Tribe has worked diligently to obtain copies of the relevant documents and has communicated with EPA regional representatives to better understand the proposed settlement. Although the Tribe's concerns are many, its primary concern centers on the impacts to the CTP (and the resultant impacts to human health and natural resources) that will likely occur as a result of the Bunker Hill Consent Decree's express contemplation of perpetual usage of the CTP by the Bunker Hill Mine as it simultaneously increases its mining activity.

The EPA's failure to engage in *any* consultation with the Tribe regarding this consent decree—as well as its impact on human health and on natural resources throughout the Coeur d'Alene-Spokane

River Basin—is contrary to the EPA's own policies regarding tribal consultation. *See EPA Region 10 Tribal Consultation and Coordination Procedures*, 5 (Oct. 2012). Those policies broadly require "meaningful communication and coordination between EPA and tribal officials *prior to* EPA taking actions or implementing decisions that may affect tribes." *Id.* Although EPA's actions have forced the Tribe to engage in the public comment process, the Tribe notes that "[t]ribal consultation is distinct from the EPA public participation . . . processes. Tribal consultation should occur *before* any EPA public [process], to offer to the EPA the opportunity to consider input from interested tribal governments *prior to* seeking public comment." *Id.*

Beyond the EPA's general guidelines, consultation was *required* in this case before EPA agreed to allow these significant changes in the operation and maintenance of the CTP as a result of increased mining activities at the Bunker Hill Mine. A primary portion of the funding for the CTP is derived from the Hecla Consent Decree,[1] to which the Tribe was a signatory party. Consistent with the Hecla Consent Decree—and with the express concurrence of the Tribe—the EPA and the Idaho Department of Environmental Quality entered into a Memorandum of Agreement regarding operation and maintenance of the CTP in June, 2014 ("CTP MOA").[2] Although the CTP MOA is not mentioned in the Bunker Hill Consent Decree, any changes to current operation and maintenance of the CTP must be made consistent with the CTP MOA. That MOA expressly provides that the Tribe "may enforce those portions of [the CTP MOA] relating to Consultation pursuant to the Hecla Consent Decree." CTP MOA at ¶ 15, p. 5-6. That right consists of "a process of meaningful communication and coordination between EPA, IDEQ, and the Tribe *before* EPA and IDEQ take actions to implement decisions pursuant to this MOA." *Id.* The Bunker Hill Consent Decree seemingly authorizes the perpetual use of CTP by the Bunker Hill mine as well as increased mining activities. The Tribe had a right to be consulted before the EPA agreed to such a drastic change to the operation and maintenance of the CTP.

The Tribe also notes that § 106 of CERCLA requires that EPA provide notice "to the affected State," before taking action that "may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). Although this section is not included in CERCLA's provision requiring Tribes be "afforded substantially the same treatment as a State," 42 U.S.C. § 9626, the EPA has recognized the Coeur d'Alene Tribe's treatment in the same manner as a state pursuant to the Clean Water Act. Given this recognition, EPA should have consulted with the Tribe *before* entering into a consent decree that could result in significant impacts on water quality upstream from the Reservation.

EPA's choice to not consult with the Tribe is particularly vexing in this case, considering the long and productive relationship the Tribe has enjoyed with the EPA. In 1986, when EPA began their

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[1] *United States of America v. Hecla Mining Company and Consolidated Cases*, No. 96-0122-N-EJL, No. 91-0342-N-EJL, and No. 94-0206-N-HLR (D. Idaho, September 8, 2011) ("Hecla Consent Decree")

[2] The CTP MOA was entered into in lieu of a superfund state contract, as required by the Hecla Consent Decree. *See* Hecla Consent Decree at § 5(d), p. 11.

Remedial Investigation Feasibility Study, the Coeur d'Alene Tribe was the only government that fully supported EPA's intention to conduct Superfund remedial actions under the Comprehensive Environmental Response, Compensation Liability Act. 42 U.S.C. § 9607. Since that time the Tribe has been a concurring government to several Records of Decisions, joint settlement Consent Decrees, and Memoranda of Agreements/Understandings. These documents defined certain aspects of our long-standing relationship with EPA and have bearing on all future proposed remedial decisions. These documents all recognize—either expressly or implicitly—the United States Department of Justice (DOJ) and EPA's trust responsibility to the Tribe. The Tribe has come to rely on EPA and the EPA on the Tribe, for early and informed notice on anything that may affect the remedy since these decisions all effect the human and environmental health in the Basin, on our reservation, and in our Lake.

For three decades the Tribe and EPA have been strong allies and partners. The Tribe has expended considerable political capital to support the EPA in a rather hostile local and regionally anti-EPA political climate. Given this longstanding relationship, the Tribe is disappointed to not have been conferred with, or provided the opportunity to engage in government-to-government consultation prior to EPA and DOJ engagement in dialog with a Potential Responsible Party (PRP) on a major element of the overall water quality remedy in the South Fork of the Coeur d'Alene River. In this instance EPA has clearly not upheld their trust responsibility nor the spirit of cooperation and coordination the Tribe has come to expect. The Tribe urges EPA and the United States to reflect upon this coordination oversight so as to improve our government-to-government relationship as we move forward.

In closing, it bears emphasizing that the Tribe's concerns in this case are not limited to the concern that the EPA did not consult with the Tribe. As outlined more fully in the appendix attached, the Tribe has significant concerns regarding the technical ramifications this consent decree may have on human health and the natural resources in the Basin. However, due to the EPA's failure to consult or provide any meaningful data underpinning its decision in this case, the Tribe has not had the opportunity to fully assess the impact this consent decree may have. Although the Tribe reserves all rights it may have under applicable law, it does not currently seek a stay in this public comment period to allow for more meaningful consultation. Instead, the Tribe respectfully requests the **comment period be extended for an additional thirty days** so that it can fully understand the technical and legal effects of this consent decree and its near and long-term ramifications.

Sincerely,

Mr. Phillip J. Cernera
Director, Lake Management Department

cc: Eric Van Orden (Tribal Director of In house Counsel)
Robert Matt (Tribal Administrative Director)

Appendix A – Technical Comments regarding the Bunker Hill Consent Decree

The following are those comments and concerns the Coeur d'Alene Tribe was able to identify in the time allotted through the comment process. Unfortunately, EPA has opted to not consult with the Tribe on this important matter and, as a result, the Tribe was not made aware of this consent decree until March 12. Because of this, the Tribe has not had the opportunity to fully assess the potential impacts this Consent Decree may have on the Bunker Hill Central Treatment Plant ("CTP"). As noted in our companion letter, the Tribe respectfully request a thirty-day extension to the comment period so that it may better understand the legal and technical ramifications of the agreement and to provide a more informed response. The Tribe has reviewed the documents mentioned above and provide EPA and DOJ with these preliminary comments that are subject to change if an extension is granted.

In general, the Tribe is guardedly optimistic that a settlement with Bunker Hill Mining Corp ("Purchaser" or "Mining Company") that provides funds for past response costs incurred by EPA and future funding for the treatment of AMD from the mine is appropriate in this case. However, the Tribe is concurrently concerned that the Consent Decree expressly contemplates reengaging in mining activities, which will increase pollution and potentially change the chemistry of the AMD from the mine site. Not only does this agreement allow a mining company access to property they do not own and use a CTP they did not build or fund, but it envisages the Mining Company's ability to continue to discharge into perpetuity at unknown AMD concentrations and volumes. The Tribe requires additional time to properly assess the threat increased mining activity may have to the CTP's operation and maintenance and, by extension, to human health and natural resources. In any case, it is the Tribe's opinion that any new mining that occurs at the site is a discharge that should require a separate treatment plant with its own NPDES permit. There should also be some form of financial assurance to provide for cleanup and restoration to guard against any potentially harmful future releases.

Specific Comments Regarding the Consent Decree:

Section V, ¶ 6, Deposit of Payment: The language in this section indicates that funds received through this consent decree may be deposited into the EPA Hazardous Substance Superfund. EPA's legal Counsel has described the language used in this section as "standard." However, as drafted, the consent decree indicates the funds either can go to finance response actions at or in connection with the Site, *or to be transferred to the EPA Hazardous Substance Superfund*, which is problematic and unacceptable. Upon further inquiry, EPA staff have assured the Tribe that the funds will be going to the Site. As such, this language is superfluous and should be stricken. The water from the Bunker Hill Mine will need to be treated into perpetuity. The funding needed for the treatment of the mines AMD at the CTP is well beyond the entire sum of funding outlined in Paragraph 4 of this Decree. The Site ID Number for the Bunker Hill Special Account needs to be referenced on all payments.

It is critical that all funds generated from the CTP be reinvested on-sight because the $700 million available in the Asarco trust fund pales in comparison to the magnitude of the contamination, which will require billions of dollars to adequately address the problem. This budgetary shortfall becomes more acute in light of the fact that EPA has yet to develop a remedy for 32 river miles of the Coeur d'Alene River, 20,000 acres of wetlands, 12 lateral lakes, and Coeur d'Alene Lake that are all hydrologically connected to the river.

Section XII, ¶ 8, Property Requirements: The monitoring described in this section should include water quality monitoring at the outfall to the South Fork Coeur d'Alene River near the future placement of the underground intercept wall.

Section XII, ¶ 28, Property Requirements: As a concurring Federally Recognized Indian Tribe, the Coeur d'Alene Tribe needs to be consulted *before* any decision document is drafted regarding institutional controls at the CTP as those decisions are federal actions that require consultation pursuant to the Memorandum of Agreement ("CTP MOA") Between the United States Environmental Protection Agency and the Idaho Department of Environmental Quality Regarding the Release of the Court Registry Funds, signed by the State, EPA and the Tribe in June of 2014. *See also*, *EPA Region 10 Tribal Consultation and Coordination Procedures* (Oct. 2012).

The Settlement Agreement:

In general, the Tribe is concerned that this Settlement Agreement outlining the funding of remedial actions at the CTP has no linkage to the CTP MOA that addresses water treatment at the CTP. That MOA was developed shortly after the Hecla Consent Decree was finalized with the concurrence of the Tribe. The MOA outlined the distribution of $66,588,208 into State and EPA accounts to be used specifically for CTP upgrades, operation and maintenance. In addition, it recognizes the Tribe's unique role in the overall remedial and restoration process and the concurrence and coordination manner in which the Tribe, EPA and the State will function. In this MOA the Tribe is recognized as a) being a natural resource trustee; b) having TAS for waters within the reservation; and c) having a profound interest in the site's clean up. The MOA also states that EPA, the Tribe, and the State recognize that EPA may determine to use some of the funds in the Endowment Account to treat contaminated waters collected in OU3 of the Site or to take other response actions in the Site. Finally, the MOA expressly provides that the Tribe "may enforce those portions of [the CTP MOA] relating to Consultation pursuant to the Hecla Consent Decree." CTP MOA at ¶ 15, p. 5-6.

Page 1, Section II ¶ 4. Jurisdiction and General Provisions: Section 106 (a) of CERCLA requires that EPA provide notice "to the affected State," before taking action that "may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). Although not explicit in 106 (a) of the code, the Tribe has Treatment as State (TAS) for water quality under 106 Authority and should have been notified in the same manner as EPA notified the State in this case.

Page 5, ¶ 17. Findings of Fact: As recognized in the findings of fact, PMC did not purchase the entire complex nor the CTP. Given this, the Tribe does not believe that PMC's successor in interest should be allowed to use the CTP to treat their AMD in perpetuity rather than develop their own treatment plant. Regardless of the Mining Company's funding contribution to treat the water at the CTP, the Tribe is concerned that this agreement sets precedent for other mining companies to have their water treated at the CTP.

Page 6, ¶ 22: The Tribe is concerned that once the Unilateral Administrative Orders (UAOs) are lifted there will no longer be any legal mechanism to assure "Work to Be Preformed" will actually occur. The Tribe also believes that the Settlement Agreement should outline the penalties if this work is not preformed.

Page 10, ¶ 33: This paragraph needs to be more fully defined in this agreement to clarify the scope of the Mining Company's right to use the CTP and/or whether EPA will require an alternate treatment option be developed by the Purchaser.

Page 11, ¶ 37: The Coeur d'Alene Tribe has National Historic Preservation Act Authority (which is an ARAR in the ROD). Please edit this section to expressly include the Tribe's authority.

Page 12, ¶ 39: It is the Tribe's understanding that the amount of $480,000 paid semi-annually is the amount that it currently costs EPA to treat the AMD. Future costs should be adjusted and additional funds should be required for wear and tear on the CTP system. Also the Tribe is curious whether EPA conducted an Ability to Pay analysis to determine the value of the company. If not, why? Furthermore, the Tribe believes the final agreement needs to include royalty payments so as to generate additional funds to conduct clean up when the mine becomes profitable.

Page 13, ¶ 41: All funds outlined pursuant to Paragraphs 38 and 39 must be expressly dedicated to the Bunker Hill Mining and Metallurgical Complex Special Account and not transferred by EPA to the EPA Hazardous Substance Superfund.

Page 16, Section XIII, ¶ 51: All water quality discharge monitoring data should be uploaded to EPA's Enforcement and Compliance History Online (ECHO) web service so the Tribe and others can assess whether the CTP is meeting design water quality effluent goals.

Finally, as mentioned above, the Tribe believes the timeframe in which EPA has elected to provide public comments is too short. We request the comment period be extended. Thank you for the opportunity to provide our preliminary comments to this important topic.